

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY
Driver and Vehicle Services Division

In the Matter of the Proposed Permanent Rules Governing Drivers' Licenses and Vehicle Records; Minnesota Rules, part 7410.0100 Definitions; part 7410.0400 Documenting Proof of Name, Date of Birth, Identity; part 7410.0410 Proof of Residency; part 7410.1810 Driver's License and Identification Card Image; and Repeal of part 7410.1800 Driver's License Photograph.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Beverly Jones Heydinger conducted a hearing regarding the above rules beginning at 9:30 a.m. on May 22, 2003, at the State Office Building, Basement Hearing Room, 100 Rev. Dr. Martin Luther King, Jr. Blvd., St. Paul, Minnesota, 55155. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act^{[\[1\]](#)} before an agency can adopt rules. The legislature has designed this process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications of the rules made after their initial publication do not result in rules that are substantially different from those originally proposed.

The rulemaking process also includes a hearing when the rules are controversial or likely to receive 25 or more requests for a hearing. The hearing is intended to allow the agency and the Administrative Law Judge (ALJ) reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The ALJ is employed by the Office of Administrative Hearings, an agency independent of the Department of Public Safety (Department).

Melissa J. Eberhart, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, MN 55103, appeared on behalf of the Driver and Vehicle Services Division of the

Department of Public Safety. Patricia McCormack, Acting Director of the Driver and Vehicle Services Division; Jane A. Nelson, Rules Coordinator, Driver and Vehicle Services Division; Jane Landwehr, Driver and Vehicle Services Division, and Denise Peterson, Driver and Vehicle Services Division, Minnesota Department of Public Safety, 445 Minnesota Street, St. Paul, MN 55101, presented the Department's position and answered questions at the hearing. Approximately 42 persons attended the hearing and 42 signed the hearing register. Approximately seventeen people spoke at the hearing.

Several public comments were submitted before the hearing. After the hearing ended, the Administrative Law Judge kept the record open for 20 calendar days until June 11, 2003, to allow interested persons and the Department an opportunity to submit written comments. During this initial comment period the ALJ received written comments from the Department and 37 public comments. Following the initial comment period, the Administrative Procedure Act requires that the hearing record remain open for another five business days to allow interested parties and the agency to respond to any written comments. The agency and two attorneys filed responses. The hearing record closed for all purposes on June 18, 2003.

SUMMARY

1. With the following exceptions, the proposed amendments meet the requirements of the Administrative Procedures Act.

2. The Department has failed to demonstrate that it has the statutory authority for its proposed proof of residency rule (7410.0410) or that the rule is necessary and reasonable. The proposed rule is also preempted by federal law governing immigration.

3. The proposed rule on verification of identity documents (7410.0400, subp. 3a), does not meet the definition of "rule."

4. The proposed rule requiring a full-face image on a driver's license (7410.1810) violates state constitutional law because the Department failed to show that there is no less restrictive alternative.

5. The Department has failed to demonstrate the need for and reasonableness of the following proposed changes to its list of primary and secondary identity documents:

a. 7410.0400, subp. 2, items B, C, E, F, deleting Canadian documents, and the related proposed item F.

b. 7410.0400, subp. 2, item G, subitem (4), requiring unexpired Permanent Resident or Resident Alien cards (I-551 or I-151).

c. 7410.0400, subp. 3, item E, deleting Canadian documents.

6. The Department has failed to demonstrate the need for and reasonableness of its proposed repeal of the religious exception for driver's license photos (7410.1800).

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On January 22, 2002, the Department published a Request for Comments on Possible Rules Governing Proof of State Residency in the State Register. The request indicated that the Department was considering a possible rule requiring presentation of documents to prove permanent United States resident status, lawful short term admission to the United States, or United States citizenship upon application for a Minnesota driver's license, permit, or state identification card. The Request for Comments was published at 26 State Register 979.^[2]

2. The Department mailed notice of the Request for Comments to its rulemaking mailing list, all Minnesota deputy registrars, licensing agents and examination sites, state sheriffs in each Minnesota county, and the Minnesota Chiefs of Police Association.^[3] The Department also placed the Request for Comments on its website.^[4]

3. When it became apparent that the Legislature would debate the adoption of these rules, the Department decided to pursue the enactment of the provisions through legislation. The Minnesota Legislature did not adopt the proposal.

4. On June 3, 2002, the Department submitted the proposed rules to the Office of Administrative Hearings (OAH) for emergency rulemaking under the good cause exemption.^[5] The Department requested immediate approval of the rules, without public notice and comment, based upon a "serious and immediate threat" to public safety^[6] in Minnesota. The emergency rulemaking generated significant public interest and, despite the lack of formal notice, OAH received letters from parties opposing the rule.^[7]

5. Administrative Law Judge George A. Beck denied the Department's request to promulgate the rules on an emergency basis without public comment on the premise that the Department had failed to adequately demonstrate an immediate threat to public safety.^[8] ALJ Beck found that the implications of the rules were of such importance that public participation through the hearing process could not be bypassed.

6. On June 14, 2002, the Department sought review of ALJ Beck's decision by Chief ALJ Kenneth A. Nickolai.^[9] Based on the Department's arguments, supplemented by additional information, Chief Judge Nickolai concluded that the proposed rules were a proper use of the good cause exemption and approved them, with modifications.^[10]

7. The Department began enforcing its new, temporary rules^[11] requiring all applicants for drivers' licenses and identification cards to prove permanent U.S. resident status, lawful short term admission, or U.S. citizenship upon application.^[12] The published rules appeared in the State Register on July 8, 2002.^[13]

8. Shortly thereafter, Jewish Community Action and the National Lawyers Guild filed an appeal challenging the rules. On March 11, 2003, the Minnesota Court of Appeals declared the rules invalid because, although the Department demonstrated a serious and immediate threat to public safety it had not shown that the normal rulemaking process was "unnecessary, impracticable or contrary to the public interest," and therefore did not meet the statutory requirements for good cause exempt rulemaking.^[14] The Department filed a petition for review and Petitioners filed a petition for conditional review with the Minnesota Supreme Court, both of which were granted. As of the date of this report, no decision has been issued by the Minnesota Supreme Court.

9. The rules being considered in this report are the permanent rules, not the temporary rules that went into effect as of July, 2002. The Department has relied on portions of the emergency rulemaking record to support the changes under review in this report.

10. On September 3, 2002, the Department published a Request for Comments on Possible Rules Relating to Driver's License and Identification Card Image in the State Register. The request indicated that the Department was considering possible rules requiring a full-face image on a state driver's license or identification card and the permanent repeal of Minn. R. 7410.1800 regarding the driver's license photograph. The Request for Comments was published at 27 State Register 333.^[15]

11. The Department mailed notice of the Request for Comments to its rulemaking mailing list, all Minnesota deputy registrars, licensing agents and examination sites, state sheriffs in each Minnesota county, and the Minnesota Chiefs of Police Association.^[16] The Department also placed the Request for Comments on its website.^[17]

12. By a letter dated March 27, 2003, the Department requested that the Office of Administrative Hearings schedule a rule hearing and assign an Administrative Law Judge. The Department also filed a proposed Notice of Hearing, a copy of the proposed rules and a draft of the Statement of Need and Reasonableness (SONAR).^[18]

13. In a letter dated April 2, 2003, Administrative Law Judge Beverly Jones Heydinger approved the Notice of Hearing.^[19]

14. On April 17, 2003, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all those referenced in the additional notice plan.^[20]

15. On April 17, 2003, the Department mailed the Notice of Hearing and the Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.^[21]

16. On April 17, 2003, the Department mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.^[22]

17. On April 21, 2003, the Notice of Hearing, signed by Richard W. Stanek, Commissioner, Department of Public Safety, was published at 27 State Register 1573-74.^[23]

18. On the day of the hearing the following documents were placed in the record:

- a. Department of Public Safety Agency Profile (Exhibit 1)
- b. Business Requirement for the Unique Identifier (Ex. 2)
- c. The proposed rule, approved by the Revisor of Statutes, dated 5/30/02 (Ex. 3)
- d. Findings and Statement of Supporting Reasons under the exempt rulemaking process (Ex. 4)
- e. Statement of Supporting Reasons for Exempt Rules – Attachment A (Ex. 5)
- f. Cover letter to Chief Administrative Law Judge regarding exempt rules, dated June 4, 2002 (Ex. 6)
- g. Cover letter to Chief Administrative Law Judge regarding review of exempt rules, dated June 14, 2002 (Ex. 7)
- h. Minnesota Court of Appeals opinion, dated March 11, 2003 (Ex. 8)
- i. Charlie Weaver editorial (Ex. 9)
- j. 2003 State Legislation/Executive Action Requiring Proof of Legal Presence and Linking Driver's License Expiration with VISAS (Ex. 10)
- k. Federal Computer Week article, dated 5/22/02 (Ex. 11)
- l. AAMVA Traffic Law Conference comments (Ex. 12)
- m. Statement of Roger Cross, AAMVA (Ex. 13)
- n. INS fax to Department, dated 12/13/01 (Ex. 14)
- o. Report of the National Commission on Terrorism (Ex. 15)
- p. California governor press release (Ex. 16)
- q. Immigration Classifications and Visa Categories (Ex. 17)
- r. National Strategy for Homeland Security (Ex. 18)
- s. Federation for American Immigration Reform Issue Brief (Ex. 19)
- t. St. Paul Pioneer Press article, dated 10/31/01 (Ex. 20)
- u. "Establishing a National System for State-Issued Secure Personal Identification" article (Ex. 21)
- v. Wisconsin driver's license application requirements (Ex. 22)
- w. North Carolina driver's license application requirements (Ex. 23)
- x. Utah driver's license application requirements (Ex. 24)

- y. Documents That Establish Both Identity and Employment Eligibility (Ex. 25)
- z. American Forces Information Service news article (Ex. 26)
- aa. INS Office of Policy and Planning Annual Report (Ex. 27)
- bb. Zuleqa Husain email (Ex. 28)
- cc. Exemptions to Driver's License Photos, July 2002 poll (Ex. 29)
- dd. INS memorandum for regional directors, dated 2/14/03 (Ex. 30)
- ee. Request for Comment, dated 1/7/02 (Ex. 31)
- ff. MN State Register, dated 1/22/02 (Ex. 32)
- gg. Certificate of Mailing List, request for comment (Ex. 33)
- hh. Department submission to MN Chiefs of Police Association, dated 1/17/02 (Ex. 34)
- ii. Department memo to Agents, Registrars Exam Stations, dated 1/17/02 (Ex. 35)
- jj. Department website, Public Notices (Ex. 36)
- kk. County Sheriff mailing list (Ex. 37)
- ll. Certificate of Providing Notice, dated 1/28/02 (Ex. 38)
- mm. Request for Comment, dated 8/22/02 (Ex. 39)
- nn. Certificate of Accuracy of Agency Rule Mailing List, dated 8/28/02 (Ex. 40)
- oo. MN State Register, dated 9/3/02 (Ex. 41)
- pp. Department submission to MN Chiefs of Police Association, dated 10/22/01 (Ex. 42)
- qq. Department memo to driver's license agents, dated 8/28/02 (Ex. 43)
- rr. Department memo to deputy registrars, dated 8/28/02 (Ex. 44)
- ss. Department memo to driver's license exam stations, dated 8/28/02 (Ex. 45)
- tt. Additional Mailing List, dated 8/27/02 (Ex. 46)
- uu. County Sheriff mailing list, dated 8/28/02 (Ex. 47)
- vv. Department website, Public Notices (Ex. 48)
- ww. Certificate of Providing Notice, dated 9/3/02 (Ex. 49)
- xx. Statement of Need and Reasonableness (SONAR), dated 4/8/03 (Ex. 50)
- yy. The proposed rule, approved by the Revisor of Statutes, dated 3/18/03 (Ex. 51)
- zz. Department submission to Chief Administrative Law Judge, dated 3/27/03 (Ex. 52)
- aaa. ALJ Heydinger letter to Department approving notice of hearing, dated 4/2/03 (Ex. 53)
- bbb. Cover letter from Department to ALJ Heydinger, dated 4/17/03 (Ex. 54)
- ccc. Notice of Hearing, dated 4/8/03 (Ex. 55)
- ddd. Cover letter to Legislative Reference Library, dated 4/17/03 (Ex. 56)
- eee. Certificate of Mailing the SONAR to the Legislative Reference Library (Ex. 57)

- fff. Cover letter to House and Senate leaders, dated 4/17/03 (Ex. 58)
- ggg. MN State Register, dated 4/21/03 (Ex. 59)
- hhh. Certificate of Accuracy of Agency Rule Mailing List, dated 4/9/03 (Ex. 60)
- iii. Department memo to driver's license agents, dated 4/17/03 (Ex. 61)
- jjj. Department memo to deputy registrars, dated 4/17/03 (Ex. 62)
- kkk. Department memo to driver's license exam stations, dated 4/17/03 (Ex. 63)
- lll. Additional Mailing List, dated 4/17/03 (Ex. 64)
- mmm. Department submission to MN Chiefs of Police Association, dated 4/17/03 (Ex. 65)
- nnn. County Sheriff mailing list (Ex. 66)
- ooo. Department website, Public Notices (Ex. 67)
- ppp. Department News Release, dated 4/21/03 (Ex. 68)
- qqq. Certificate of Giving Notice Pursuant to Notice Plan, dated 4/22/03 (Ex. 69)
- rrr. Department power point presentation from hearing (Ex. 70)
- sss. Exhibit List for the hearing (Ex. 71)
- ttt. Pre-hearing comment, Juan Montoya (Ex. 72)
- uuu. Pre-hearing comment, Elaine C. Schneider (Ex. 73)
- vvv. Pre-hearing comment, John E. Rollin (Ex. 74)
- www. Pre-hearing comment, Robert P. Webber (Ex. 75)
- xxx. Department modification #1 (Ex. 76)
- yyy. Pre-hearing comment, Janice Goldstein (Ex. 77)
- zzz. Pre-hearing comment, Bill Lerman (Ex. 78)
- aaaa. Pre-hearing comment, Elizabeth A. McLeod (Ex. 79)
- bbbb. Pre-hearing comment, Vic Grossman (Ex. 80)
- cccc. Comment submitted at hearing, Elizabeth M. Streefland (Ex. 81)
- dddd. Comment submitted at hearing, Marilyn Larson (Ex. 82)
- eeee. Comment submitted at hearing, F.B. Daniel (Ex. 83)
- ffff. Comment submitted at hearing, Chris Carlson (Ex. 84)
- gggg. Comment submitted at hearing, Leonard Oppenheimer (Ex. 85)
- hhhh. Comment submitted at hearing, Alan B. Goldfarb (Ex. 86)

Nature of the Proposed Rules

19. These proposed rules relate to Minnesota drivers' licenses, permits, and identification cards (the term "driver's license" will be used herein to denote all three documents). The rules amend the documents allowed by the Department to prove name, date of birth, and identity in the license application process; most notably the Department proposes to no longer accept drivers' licenses from other states.^[24] Further, the Department proposes the addition of a new rule part requiring license applicants to prove Minnesota residency at the time of application and renewal.^[25] This rule part also requires the indication of a status check date on the license of all applicants in the U.S. under lawful short-term admission status and addresses license reissuance, cancellation, and denial as well as variance procedures. Finally, the

Department proposes to repeal the religious exemption^[26] to the full-face image on the license.^[27] As a secondary matter, the Department also seeks to update terminology and promote consistency throughout the rules. The Department proposes these amendments and additions as a means of enhancing security and identity features of state-issued licenses, and addressing fraud and misrepresentation in the application process, all of which can aid in fighting terrorist activity and increase public safety.^[28]

Statutory Authority

20. The Department relies upon the following general rulemaking authority.
21. Minnesota Statutes § 171.06 requires the Department to administer law relating to applications and fees for licenses.
22. Minnesota Statutes § 171.061, subdivision 6 requires that “the commissioner shall adopt rules that prescribe . . . (3) standards for the uniform administration of laws and rules governing the receipt of applications and fees for applications . . . (5) standards for submitting applications including valid forms of identification, depositing of funds, maintaining records. . . .”
23. Minnesota Statutes § 171.07, subdivision 1 requires the Department to issue qualified applicants a license with “a description of the licensee in such a manner as the commissioner deems necessary,” and to require a color photo.
24. Minnesota Statutes § 171.071, subdivision 1 allows the commissioner of public safety to “adopt rules to permit identification on a driver’s license or Minnesota identification card in lieu of a photograph or electronically produced image where the commissioner finds that the licensee has religious objections to the use of a photograph or electronically produced image.”
25. Authority for the proposed rules is also found in Minn. Stat. § 299A.01, subd. 7. This law adopted in Laws 2000, chapter 445, article 1, section 2, provides authority for rules adopted under section 299A.01, subd. 6, paragraph (a) to remain in effect on and after July 1, 1997, until further amended or repealed.
26. Minnesota Statutes § 299A.01, subd. 6, paragraph (a), effective in 1996, provided general authority for the commissioner of public safety to adopt administrative rules to carry out those duties and functions administered by the division of motor vehicles and the division of drivers’ licenses which were transferred to the department of public safety in 1969. The divisions of motor vehicles and drivers’ licenses were subsequently combined within the Department of Public Safety to become the Driver and Vehicle Services Division. The proposed rules continue to carry out the functions transferred to the Department in 1967 and contained in chapters 169-171 – namely the issuance of drivers’ licenses, the examination of drivers, and the refusal to issue a license as prescribed in section 171.04 for various reasons including being inimical to

public safety and welfare. Rules currently adopted within Minnesota Rules chapter 7410 cite to section 299A.01.

27. The Department has established its general statutory authority to adopt rules in this area.

Regulatory Analysis in the SONAR

28. The Administrative Procedure Act requires an agency adopting rules to consider six factors in its Statement of Need and Reasonableness.^[29] The first factor requires:

(A) A description of the classes of persons who will be affected by the proposed rules, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

29. The Department states that the proposed rules will affect applicants for a driver's license. U.S. citizens, naturalized citizens, and permanent U.S. residents such as legal immigrants and refugees will not be directly affected by the proposed status check provisions. But those individuals, along with temporary visitors and tourists, will no longer be able to present a driver's license or identification card from another state or Canadian territory as a stand-alone document to initially obtain a Minnesota driver's license, permit, or identification card. Additionally, persons who do not have a certified copy of their birth certificate from a bureau of health based in the U.S. or from a U.S. embassy will bear a cost of generally \$10-\$15 to obtain one. If an individual was born in Minnesota and makes application at a site where the birth certificate is filed, no additional cost will be incurred if the official is able to readily retrieve and view the certificate.

30. The Department anticipates that the proposed rules will enhance public safety and homeland security and decrease confusion between federal, state, and local law enforcement.^[30] Its proposals were supported by Minnesotans for Immigration Reform and several individual members of that group. Numerous commenters disagreed with this assertion and argued that the proposed rules create barriers to obtaining a driver's license, thereby increasing the number of unlicensed or uninsured drivers and actually decreasing public safety via more traffic accidents and impeded police investigations. Many of these same commenters also feared the breakdown of trust and communication between immigrants and law enforcement due to immigrants' fear of deportation, difficulty locating unlicensed immigrants who are out of legally authorized status, and above all, potential discriminatory practices against immigrants. Finally, one commenter opined that individuals entering the U.S. with intent to commit terrorist acts would find a way to do so regardless of additional hurdles.^[31]

(B) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

31. The Department does not anticipate that the rule amendments will have any impact on state revenue because programming and implementation costs have been absorbed into the existing Department budget. No additional costs are anticipated. Several commenters disagreed with this assertion and speculated that the Department has not fully anticipated the costs necessary to train its employees to recognize which documents demonstrate lawful presence in the U.S.^[32]

32. The Department suggests that local and state health departments may receive an increase in demand for birth certificates.

(C) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

33. The Department states that there are no less costly or intrusive methods for achieving the purpose of these rules. Other states have explored the addition of biometric identifiers such as fingerprints, retinal scans, or facial recognition to the driver's license system, and while these identifiers are better methods of establishing identity, they are costly and more intrusive. The Department has consulted federal officials to determine which U.S. documents show authorized legal presence in the U.S. that individuals will generally possess or can obtain at a low cost.

34. As to intrusiveness, the Department acknowledges that the status check date could be maintained solely in the driving record, but ultimately wanted law enforcement and driver's license application staff to have a visual tool to aid in their job duties. The Department claims that most lay people will not recognize the status check date on the license, thus the privacy of individuals whose licenses contain the indicator will not be invaded. Further, the Department chose the language "status check" as a further means of protecting the privacy of affected individuals. Many commenters challenged the Department's assertions. See discussion of proposed rule 7410.0410.

(D) A description of any alternative methods for achieving the purpose of the proposed rules that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rules.

35. The Department considered issuing licenses only to individuals born in the U.S., naturalized citizens, or individuals who have been granted permanent residency status by federal authorities. This approach was rejected because it excluded individuals with short-term admission status from receiving a license or identity document.

36. The Department also considered accepting of rent receipts, professional licenses, canceled checks, or life insurance policies as proof of name and date of birth.

The Department rejected these documents due to ease of forgery and lack of relationship to whether the individual is authorized to be in the country.

(E) The probable costs of complying with the proposed rules.

37. Individuals who move to Minnesota, whether U.S. born or naturalized citizens, will bear the cost of obtaining a primary document, if they have not already done so for other purposes, since they are no longer able to present licenses and identification from other states to prove residency.

38. Individuals issued a license containing a status check indicator, whose license has expired or whose name or address has changed, will bear the cost of a duplicate fee of \$8 in the event federal approval is granted to change or extend admission status and they wish to maintain their Minnesota license.^[33] Additionally, state-issued documents for individuals with short-term admission status will not be automatically renewable.

(F) An assessment of any differences between the proposed rules and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

39. There are no federal laws or regulations on the issuance of a national identity card, or federal standards for proof of identity and residency prior to issuance of state drivers' licenses. No federal laws or regulations directly impact the issuance of a state driver's license.^[34]

40. The Department has satisfied the requirements of Minn. Stat. § 14.131, which requires it to ascertain the above information to the extent the Department can do so through reasonable effort.

Performance Based Rules

41. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems.^[35] A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.^[36] The Department maintains that the proposed rules provide clarity and consistency in enforcement of the laws. The new variance procedure^[37] increases flexibility for the regulated party and the agency.

Impact on Farming Operations

42. The Department states that the proposed rules have no direct or substantial adverse impact on agricultural land and are not specifically designed to affect farming operations. Any impact felt by the farming community will be indirect.

Several commenters disagreed with the Department's assessment and felt that the farming community would be tangibly impacted when migrant workers, fearing deportation due to the more stringent rules, declined to risk working in Minnesota.^[38] Stricter rules governing proof of identity may disproportionately affect undocumented workers. Historically, many such workers have worked in Minnesota's farming operations, but also in other sectors as well. Federal laws have tightened the documentation employers must obtain prior to hiring new workers. There was no evidence of the direct effect, if any, the rule changes would have on farming operations or any other specific sector of the economy. On their face, the proposed rule changes have no such direct or substantial impact.^[39]

Additional Notice

43. In addition to the mailed and published notice required by statute, the Department also mailed a copy of the rules to all deputy registrars, licensing agents, and state examination and application sites, requesting posting of the notice and rule in a public place; all parties who expressed interest in the exempt emergency rules or in response to the request for comment; all print and electronic news media in Minnesota; all county sheriffs; and the Minnesota Chiefs of Police Association. A copy of the notice, the proposed rules and the SONAR were also published on the Department's web page.

Rulemaking Legal Standards

44. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.^[40] The Department prepared a Statement of Need and Reasonableness in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by exhibits and comments made by agency representatives at the public hearing and in written post-hearing submissions.

45. The question of whether a rule has been shown to be reasonable focuses on whether it has a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.^[41] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.^[42] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.^[43] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."^[44] An agency is entitled to make choices between possible approaches as long as the choice made is rational. It is not the proper role of the Administrative Law Judge to determine

which policy alternative presents the “best” approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.^[45]

46. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.^[46] In this matter, the Department has proposed some changes to the rule language after publication in the State Register. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.^[47]

47. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if “the differences are within the scope of the matter announced ... in the notice of hearing and are in character with the issues raised in that notice,” the differences “are a logical outgrowth of the contents of the ... notice of hearing and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

48. In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether “persons who will be affected by the rule should have understood that the rulemaking proceeding ... could affect their interests,” whether “the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the ... notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the ... notice of hearing.”^[48]

49. At the hearing, the Administrative Law Judge and a commenter raised a point of confusion in one subpart of the rule, which the Department subsequently clarified. Any substantive language that differs from the rule as published in the State Register has been assessed to determine whether the language is substantially different. Because some of the changes are not controversial, not all of the altered language has been discussed. Any change not discussed is found to be not substantially different from the rule as published in the State Register.

Analysis of the Proposed Rules

50. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. All of the public comments were fully considered. A detailed discussion of the proposed rules is unnecessary when the proposed rules are adequately supported by the SONAR or the Department’s oral or written comments, and there is no public opposition. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically

discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Discussion of Proposed Rules by Subpart

7410.0400 Documenting Proof of Name, Date of Birth, Identity.

51. The Department asserts that its proposed amendments are necessary and reasonable to protect the integrity of its driver's license. The Department contends that acceptable documents must provide adequate proof of name, date of birth, and identity. Documents issued by other U.S. states and territories, the District of Columbia, and Canadian provinces lack uniform issuance standards. Information gathered after September 11, 2001, shows that some states issue identity documents without adequate support. The Department cites North Carolina, Utah, Wisconsin, and Iowa, in particular. The Department chooses to accept only primary documents that it is confident will prove identity.^[49]

52. The Department takes a broad view of its authority to tighten standards for issuing a driver's license because the licenses are "gateway documents" that help an individual establish a legitimate identity, obtain additional forms of identification, access bank accounts and credit cards, cash checks or engage in other types of commercial transactions. A driver's license may also assist individuals in obtaining benefits such as in-state tuition, health care and other social service benefits, and sports licenses that are only available to Minnesota residents. The Department references a survey commissioned by the American Association of Motor Vehicle Administrators (AAMVA) in April 2002. Over 83 percent of the individuals polled used their driver's license daily for identification in transactions and commerce.^[50]

53. The Department points out that identity theft is an increasing problem throughout the U.S., including Minnesota. It refers to a report from the Federal Trade Commission that incidents of identity theft and fraud nationwide are expected to more than triple from 500,000 in 2000 to 1.7 million by 2005.^[51]

54. The Department acknowledges that there are no national standards for identification, or for issuing a driver's license.^[52] The lack of national standards may have benefited terrorists. The National Strategy for Homeland Security reports that there are no national or agreed upon standards for content, format or license acquisition procedures. It states: "Terrorist organizations, including Al-Qaeda operatives involved in the September 11 attacks, have exploited these differences."^[53]

55. The Department stresses that other states are also tightening their standards, either through legislative or administrative action, because of the heightened concern nationwide about lax security standards.

56. In summary, the Department states: "For the safety, security and peace of mind of its residents, Minnesota must produce a recognizably reliable source of

identification in issuing licenses and, at the same time, reduce exposure to identity theft and fraud.”^[54]

57. In addition to its goal of tightening the identity requirements, the Department asserts that it has an interest in assuring that temporary visitors to the United States do not have a driver’s license after the time period of lawful admission granted by the Immigration and Naturalization Service (INS) of the United States Department of Justice.^[55] In proposed rule 7410.0410 – Proof of Residency, the Department requires all applicants to present a primary identity document as proof of lawful presence in the U.S. To further that goal, the Department proposes some changes to its list of primary documents.

58. The Department maintains that a driver’s license allows access to “privileges normally reserved for citizens or permanent residents of Minnesota and the U.S.”^[56] It references many uses for the driver’s license, such as opening bank accounts, obtaining credit, health care and other social service benefits, entering buildings or renting a vehicle, but does not indicate which ones, if any, are available only to persons who are citizens or permanent residents.

59. As more fully explained in the discussion of proposed rule 7410.0410, neither the Minnesota Legislature nor the United States Congress has given the Department authority to tie driver’s license eligibility to lawful presence in the U.S. or permanent resident status. The regulation of aliens is the exclusive province of the U.S. Congress. The Department has not shown that federal law authorizes the states to tie driver’s licenses to lawful admission, or that the federal government has set uniform standards for states to follow when processing aliens’ applications. Neither has the Department demonstrated the link between proposed rule 7410.0410 and national security.

60. The need for and reasonableness of the proposed amendments to rule 7410.0400 will be analyzed in the context of the Department’s authority to require proof of identity, without regard to lawful presence in the United States.

61. The Department has broad statutory authority to promulgate rules that govern the driver’s license application. “An application must state the full name, date of birth, sex, and residence address of the applicant,” and “as may be required by the commissioner, contain a description of the applicant and any other facts pertaining to the applicant, the applicant’s driving privileges, and the applicant’s ability to operate a motor vehicle with safety....”^[57] Also, “[t]he commissioner shall adopt rules that prescribe: ... standards for the uniform administration of laws and rules governing the receipt of applications...,” and “standards for submitting applications including valid forms of identification....”^[58]

7410.0400, subpart 1, item C, subitem (3) (Repeal).

62. The amendments to 7410.0400 change the documentation of identity that the Department will accept from applicants. First, the Department proposes to delete

7410.0400 subp. 1, item C, subitem (3). Subpart 1 requires an applicant for a driver's license to present a Minnesota driver's license, if one has been issued to the applicant. Subpart 1, item C requires the applicant to present one "primary document" and one "secondary document" to prove full name, date of birth and identity if the applicant does not have a current Minnesota driver's license, or one that expired within the past five years and includes a photo,^[59] or within the past year if the driver's license lacks a photo. The amendment deletes the current provision allowing the applicant to present a driver's license with a photo issued by another state in lieu of the primary and secondary identity documents. As amended, the rule reads:

C. As proof of full name, date of birth, and identity, the applicant must present one primary document and one secondary document if the applicant cannot present:

(1) a Minnesota driver's license, identification card, or permit that is current or has been expired for five years or less with a color photograph or electronically produced image; or

(2) a Minnesota driver's license, identification card, or permit that is current or has been expired for one year or less without a color photograph or electronically produced or digitized image; or

~~(3) a driver's license, identification card, or permit issued by a United States state, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, or a Canadian province or territory that:~~

~~(a) is current or not expired for more than one year; and~~

~~(b) has a color photograph or electronically produced or digitized image of the applicant. . . .~~

63. As stated above, the primary reason for this change is that the driver's license standards used by other states and territories, as well as Canadian provinces or territories, are inconsistent. There is no national standard that is applied, and the Department has learned through experience that some of the procedures used in other states are lax enough that persons can obtain those driver's licenses fraudulently. For example, Department staff have reported many cases where an applicant who could not present acceptable identification was denied a Minnesota license and returned within a few days or weeks and presented a license from a state with less stringent identity requirements.^[60]

64. The Department had strong support from Minnesotans for Immigration Reform, who believes that the driver's license is a key link to public safety, privacy, daily convenience and national security. The group asserted that the Department's proposed primary identity document amendments would work to uphold the integrity of the driver's license.^[61]

65. At least one commenter objected that the Department did not support its claim with statistics, numbers, or research about individuals obtaining drivers' licenses in other less-stringent states in order to obtain a Minnesota license.^[62] However it is the lack of uniformity that the Department relies upon, and thus the lack of assurance that a license issued in other states would require reliable proof of full name, date of birth, sex, and residence address of the applicant, as required by Minnesota law. The Department has the authority to require forms of identification that it can rely upon, and has adequately shown that the inconsistent standards applied in other states affect the reliability of an out-of-state license for identification.

66. Other commenters were concerned that persons applying for Minnesota licenses may not be able to easily obtain primary identity documents.^[63] This may be true. Not everyone has ready access to the other acceptable documents, such as a certified copy of the applicant's birth certificate, adoption certificate or unexpired United States passport. However, the Department has made an adequate showing that the inconsistent standards applied in other states, territories and Canada undercut the reliability of their driver's licenses to document full name, date of birth and identity. The repeal of subpart 1, item C, subitem (3) is necessary and reasonable.

67. One comment pointed out that current Minnesota driver's license holders (or persons with a recently-expired Minnesota license) could have obtained their license based on a document that the Department now considers untrustworthy, such as an out-of-state license.^[64] Current license holders will not need to present a primary identity document to renew their licenses, regardless of the documentation presented when they first applied.

68. The Department did not explain why current license holders will not be required to present proof of identity when they next renew their license. Most of its arguments about the need to assure identity would seem to apply equally to current license holders. However, current license holders were issued a driver's license under the rules in effect when they applied. There are thousands of licensed drivers, and it can be assumed that a high proportion presented acceptable identity documents and truthfully represented their identity. Failure to apply the new identity document standards to current license holders does undercut some of the Department's claims that weak security in other states has led to inappropriate issuance of a Minnesota driver's license. However, the Department could reasonably conclude that verifying every current license holder's identity would be more expensive, cumbersome and intrusive than is warranted by the perceived risk. This is the type of decision that the agency has the discretion to make. Thus, it is reasonable for the Department to apply the stricter requirements concerning acceptable identity documents prospectively to new applicants.

7410.0400, subpart 2 Primary Documents.

69. If the applicant for a driver's license, or an individual who is applying as the owner for a vehicle title or registration, cannot present a Minnesota driver's license, identification card, or permit, as described in subpart 1, item C, then the applicant must

present one legible, unaltered, primary document that contains the applicant's full name and date of birth as proof of name, date of birth, and identity.

70. The Department proposes to amend the list of primary documents it will accept. First, to be consistent with its change in subpart 1, it eliminates expired drivers' licenses issued outside of Minnesota. For the reasons sent forth above, the Department has demonstrated the need for and reasonableness of eliminating reliance on out-of-state drivers' licenses.

71. The Department seeks to amend subpart 2, items B, C and E so that only a birth certificate, adoption certificate or passport issued in the United States are acceptable primary documents. Under the current rules, Canadian-issued documents of the same type are accepted without additional documentation. The Department's proposed changes to current subpart 2, items B, C, and E eliminate Canadian-issued birth certificates, adoption certificates and unexpired passports, respectively, as acceptable identity documents. Instead, the Department proposes a new subpart 2, item F that allows a Canadian birth certificate or Canadian naturalization certificate as primary documents, when accompanied by supplemental documentation.

F. An applicant or owner may present a Canadian birth certificate or Canadian naturalization certificate with a United States Department of Justice or a United States Department of Homeland Security Arrival and Departure Form I-94 attached, bearing the same name as that on the Canadian birth certificate or Canadian naturalization certificate and containing an unexpired endorsement of the alien's nonimmigrant status or authorized presence. The applicant or owner must also present a secondary document as described in subpart 3, issued by a Canadian government agency and containing a photograph or image of the applicant. . . .

72. The Department must show the need for and reasonableness of eliminating the use of current Canadian-issued documents, as well as adding the new provision. The present rule presumably reflects a prior determination that Canadian documents were acceptable primary documents. The Department must establish its change of course.^[65]

73. The Department's rationale for rejecting the Canadian birth certificate, adoption certificate and passport is that they are "not sufficient to establish authorized entry in the U.S."^[66] However, it is important to distinguish between documents to establish identity and documents that establish authorized entry into the United States. The Department has not offered any evidence that the certified Canadian birth certificate, adoption certificate or valid passport have failed to provide a reliable method of establishing full name, date of birth, and identity, nor does it offer any information, as it has for out-of-state drivers' licenses, that it has had problems with inconsistent standards, fraudulent documents, or false claims of identity based on such duly-issued Canadian documents. Specifically, in the SONAR the Department refers to incidents

where persons who were turned down in Minnesota because of inadequate identification, soon reappeared with a newly-issued driver's license from another state. However, the Department does not present any such evidence, anecdotal or otherwise, that Canadian birth certificates, adoption certificates, or passports were subject to the same abuse. The Department also claims that it can exclude the documents because Canadians who are in the United States will have other documents that will demonstrate both identity and lawful presence, as specified in proposed subpart 2, item F.

74. The Department argues that proof of lawful presence is necessary to assist the INS in its efforts to locate persons who remain in the United States after their admission status has expired. It claims that such persons are able to stay "because these visitors are able to gain access to 'legal privileges' by using a state-issued driver's license or identification card, allowing them to meld into society." However, this is a separate question from whether the individual has presented adequate evidence of identity.^[67]

75. The Department also contends that the rule amendments are necessary to fight terrorism, but it has failed to link terrorism to the Canadian documents that it has accepted to prove identity. There is no evidence, or even the suggestion, that persons engaged in terrorism, identity fraud or other illegal acts relied upon these Canadian documents to gain admission to the United States and a driver's license, or that persons with Canadian-issued documents are disproportionately engaged in such activity.

76. Arguably the Department could choose to treat Canadian citizens in the same way that it treats persons from all other countries. However, the Department has not stated this rationale for the proposed amendments.

77. Certainly the threat of terrorism has altered the landscape for federal and state authorities, and greater efforts are being made to screen persons who enter the U.S. or travel between countries. However, one must examine the Department's proposals in light of its statutory authority, and the federal law that governs treatment of aliens in this country, and the Department must rationally connect its proposed rule changes to the problems it proposes to address. The Department has intertwined two concepts: identity and authorized presence. It has failed to show why the amendments that delete Canadian documents from current subpart 2, items B, C and E are necessary or reasonable, and it has failed to demonstrate the need for new subpart 2, item F.

78. The Department has also proposed changes to subpart 2, item B and subpart 3, items B and E to clarify that references to the Virgin Islands refer only to the U.S. Virgin Islands, and not to the British Virgin Islands. It could be argued that since Canada is not part of the United States and is included in these lists, and the Department did not demonstrate the need for deleting Canada, that the need for the narrower definition of Virgin Islands was also not demonstrated. However, Great Britain and its other territories are not included in the list, and it seems more likely that this change is intended to clarify the Department's original intent, as it has stated in its

SONAR.^[68] Thus, the Department has demonstrated the need for and reasonableness of these proposed amendments.

79. The proposed amendments to current subpart 2, item D and item F, subitem (1) drew no objection and are necessary and reasonable to update the rule's terminology.

80. Subpart 2, item G of the current rule includes a list of documents that will be accepted to prove identity of persons who do not have the listed U.S.-issued documents. The Department proposed few amendments to its current list.

81. The Department proposes to amend subpart 2, item G, subitem (4), one item on the list of acceptable identity documents for persons who are citizens of neither the United States nor Canada as follows: "Permanent Resident or Resident Alien card (Form I-551 or I-151) that is valid and not expired." The Department concedes in its comments that persons issued an I-551 or I-151 have permanent resident status and that these INS forms contain biometric identifiers.^[69] The only rationale for the proposed amendment is tied not to identity, but to lawful presence, even though the Department concedes that expiration of these forms does not necessarily mean that the individual is not lawfully present in the U.S. It suggests that persons with expired forms could seek a variance. The Department has not explained why persons who have been issued these forms should be required to seek a variance. The Department has not shown that the amendment to subpart 2, item G, subitem (4) is either necessary or reasonable.

82. Several comments expressed concern that the primary documents listed would not be inclusive enough to encompass all situations when an individual is legally present in the U.S.^[70] This is significant because the Department proposes to use the primary documents not only to establish identity, but also to establish lawful presence, as set forth in proposed rule 7410.0410, subd. 4. The suggested additions to establish lawful presence are covered in the discussion of 7410.0410.

83. Based upon these comments, the Department agreed to make the following modification to part 7410.0400, subpart 2, item F, subitem (1):

a United States Department of Justice or United States Department of Homeland Security Arrival and Departure Form I-94 attached, bearing the same name as that on the passport and containing an unexpired endorsement of the alien's nonimmigrant status or authorized presence or an expired Form I-94 together with Form I-797 accepted by the United States Department of Justice or the United States Department of Homeland Security within the past one year for an extension or change of the alien's nonimmigrant status or authorized presence, or a Form I-94 endorsed 'D/S' together with an unexpired Form I-20 or Form DS-2019;

84. This change will add to the list of approved identity documents and decrease the group of persons who must seek a variance. It is necessary and reasonable because the Department has determined that the additional documentation provides adequate assurance of identity by the federal government. Its proposed

modification to current item F, subitem (1), was made in response to public comments, and is the type of modification that could have been reasonably anticipated in light of the rule's scope. It is not a substantial change.

7410.0400, subpart 3 Secondary Documents.

85. In addition to presenting a primary document, an applicant who cannot present a Minnesota driver's license must also present a secondary document. The Department proposes a few changes to the list of acceptable secondary documents.

B. a driver's license, identification card, or permit, ~~without~~ with a photograph or digitized image, issued by a United States state other than Minnesota, or by the District of Columbia, Guam, Puerto Rico, ~~or~~ the United States Virgin Islands, or a Canadian province or territory, that has expired not more than five years, or that is current; . . .

E. a certified copy of a record of birth issued by a government jurisdiction other than one in the United States, ~~Canada,~~ the District of Columbia, Guam, Puerto Rico, or the United States Virgin Islands; . . .

86. As explained above, out-of-state drivers' licenses with a photograph have been deleted as primary identity documents. Instead, the Department proposes to amend subpart 3, to accept a drivers' license with a photo or digitized image (but not one without a photo or digitized image) as a secondary identity document. An out-of-state driver's license without a photo will no longer be accepted as a secondary document. These changes are consistent with the Department's authority to determine identity. As stated in the SONAR, it is difficult for the Department to establish that the person presenting a driver's license without a photo is in fact the person he or she purports to be. The Department has demonstrated the need for and reasonableness of the proposed amendment to subpart 3, item B. Additional changes to subpart 3 items B and E to specify the United States Virgin Islands are approved for the reasons discussed above for subpart 2.^[71]

87. For the reasons that the deletion of Canadian documents from the list of primary documents in subpart 2 was not approved, the proposed deletion of "Canada" from subpart 3, item E is neither necessary nor reasonable and is not approved.^[72]

88. The lists of currently acceptable primary and secondary documents are left largely unchanged by the Department's proposed amendments. Several commenters suggest that the lists are too limited, especially for persons from another country. One commenter suggested that the Individual Taxpayer Identification Number (ITIN) should be accepted because it is consistent, secure, and accepted by the Minnesota Department of Revenue and national banks, including Wells Fargo and US Bank.^[73] Other commenters suggested that the list of approved INS documents does not cover all persons who have been lawfully admitted to the U.S.^[74] In particular these commenters focused on persons who had expired documentation issued by the INS. To the extent that those comments refer to the I-551 and I-151, the Department's

proposed change to subpart 2, item G, subitem (4) was not approved, and the forms will be acceptable, regardless of whether they have expired. Since the proposed Proof of Residency rule has not been approved, there is no need to broaden the list of primary and secondary documents to establish lawful presence. It is difficult to evaluate the proposed additions for the purpose of establishing identity without knowing whether the documents establish name, date of birth and identity in a manner that the Department can rely upon.

89. The Department has relied upon its variance process to review identity documents that are not commonly presented or do not present a level of security it deems acceptable. By using the variance process, fewer Department staff must evaluate the broad range of INS documents that may assist in establishing identity. The Department is justified in taking this approach to establishing identity, even though it may delay the processing of some applications.

90. The Department's current variance rule, Minn. R. 7410.0600, sets out the standards for evaluating other types of documentation, including the availability of required documents; the degree of hardship placed on the applicant; the effect of granting the variance on the public; the effect of granting the variance on the integrity of the record system; and the trustworthiness of the information supplied by the applicant regarding the applicant's name and identity. It is clear that the focus of the variance process is on establishing identity. This is a reasonable approach for handling small numbers of applicants who have documents not commonly presented to Department staff. There is no evidence that other INS documents containing sufficient identity information and frequently presented to the Department have been omitted from its list.^[75]

7410.0400, subpart 3a Verification.

91. The Department has proposed adding subpart 3a, "Verification." It states: "If necessary, the department must be able to verify with the issuing jurisdiction the issuance of and authenticity of the primary or secondary document presented." In the SONAR, the Department explains that it often verifies the issuance of and validity of various documents that are presented. It generally relies upon the issuing authority or U.S. government officials to verify security features of the document.^[76] It cites as examples translated documents and documents issued by a government or country that no longer exists.^[77] However, neither the rule nor the SONAR explains when the Department will verify documents. It uses the phrase "if necessary." This fails to provide the appropriate level of specificity for agency action. It could mean that the Department won't accept any document that cannot be verified if the document might be later questioned for authenticity, or it could mean that unfamiliar documents or documents that appear to be altered will be verified. There may be other possible meanings. The SONAR does not clarify the meaning.

92. Also, the proposed rule does not state the consequence if a document is presented that cannot be verified. Because the proposed language fails to "make specific the law enforced or administered by the agency," it does not meet the statutory

definition of a “rule,”^[78] and therefore is defective. Because the Department has included the topic of verification in its proposed rule, and explained that there are circumstances when it is required, the public has notice that verification is at issue in this proceeding. The Department may be able to correct this defect without making a substantial change to the rule as proposed.

7410.0410 Proof of Residency.

93. The proposed new rule concerning residency was the most controversial. It would require every applicant to document his or her lawful presence in the United States to be eligible for a driver’s license. The premise underlying the new rule is that, as a matter of law, a person cannot be a Minnesota resident unless he or she is lawfully present in this country. Thus, subpart 1 of the proposed rule requires that an applicant attest to a Minnesota residence, and submit documentation to demonstrate that the person is authorized to be in the United States. Subpart 2 requires that persons with lawful short-term admission must also provide proof of lawful presence at renewal. Persons with permanent or indefinite authorized status are not required to present documentation of legal presence at renewal. The proposed rule does not require documentation of a Minnesota residence.

94. Subpart 4 requires an applicant to present one of the primary identity documents listed in 7410.0400, subp. 2 to establish lawful presence. If the primary identity document that is presented establishes a basis for short-term admission but does not include the date that the admission period ends, the applicant must also present documentation issued by the United States Department of Justice or the Department of Homeland Security that specifies the duration of the applicant’s short-term admission status.

95. Other proposed subdivisions clarify the effect of short-term admission on the issuance of the driver’s license. If the short-term admission is due to expire in less than 30 days from application, the Department will allow an application to be made, and issue a receipt, but it will not issue the license.^[79] If the short-term admission is due to expire in more than 30 days, the license will be issued with a status check date on the license that coincides with the lawful admission period on the federal documentation.^[80] If the applicant demonstrates that the federal government has extended that person’s approved length of stay, the Department will reissue the driver’s license to reflect the change.^[81] The driver’s license can be cancelled on the status check date unless the license holder presents evidence of an extension. Notice of possible cancellation will be given prior to cancellation.^[82] A cancellation order will also be mailed at least seven days before the status check date indicating that the driver’s license has been cancelled.

96. Subpart 7 states that the Department will not issue a driver’s license if the person has “no lawful admission status to the United States.”

97. The Department expects that the proposed rule will coordinate state residency and federal authorized presence, enhance national homeland security, and

address the serious threat of terrorism. The Department does not want to undermine the federal authorized presence and admission standards by issuing a Minnesota license that may allow a person who is not lawfully present to become assimilated into the community.^[83] The Department contends that the status check date will reflect the last day upon which the individual can be considered a resident of Minnesota and therefore the last day that the person is authorized to have a Minnesota license. Also, the Department contends that the status check date will inform law enforcement when further investigation of the driver's legal presence may be warranted.

98. Minnesotans for Immigration Reform (MFIR) strongly supports the use of a status check date on the license as a means of bolstering federal immigration law. The group equates the small print of the status check date to license notations or indicators for corrective lenses or medical conditions thus minimizing the potential discriminatory effect of the status check date.^[84] MFIR points to other instances where verification of alien status is commonplace, including application for food stamps, medical care, or education. Finally, MFIR notes the states' obligations to coordinate their laws with federal laws and standards.

99. Commenters challenge the Department's authority to tie lawful presence to issuance of the driver's license.^[85] Several objections have been raised. First, does the Department have the statutory authority to condition a driver's license on proof of lawful presence in the United States? Second, does the Department have the authority to determine who is legally present in this country and who is not? The Department claims that it will rely solely on the federal government's determination of status, but some commenters contend that the rule as proposed does not reflect that deference. Third, there are objections that the status check date imposes a significant burden on persons who are legally present at the time they apply for their license, and may lead to unanticipated and undesirable denial of other services. Finally, some commenters assert that the Department fails to adequately tie the need for and reasonableness of the status check date to immigration enforcement or national security.

100. Numerous commenters suggested that the status check date violates the Equal Protection Clause, amendment XIV, of the United States Constitution, as well as the Minnesota Constitution.^[86]

101. As more fully discussed below, the Department must show that it has the statutory authority to require proof of lawful presence in the U.S. The Minnesota Supreme Court has required clear statutory authority when a state agency attempts to condition eligibility for a state program on immigration status. This strict approach is entirely consistent with United States Supreme Court decisions that closely scrutinize state efforts to regulate aliens. The U.S. Constitution grants authority to regulate immigration to the U.S. Congress, and state efforts that interfere or conflict with federal law are impermissible. Finally, the Department must show that the proposed rule is necessary and reasonable to accomplish its stated purpose, to support federal immigration laws, enhance national security and deter terrorism.

Statutory Authority

102. The Department has no statutory authority to condition a driver's license on lawful presence in the U.S. Minnesota Statutes § 171.04 defines who is not eligible for a driver's license. No provision of that statute excludes a person who is not lawfully present in the U.S. Only one provision of that statute gives the commissioner authority to determine who should not get a license, but it does not apply, nor does the Department rely upon it. It states that a license can be denied "to any person when the commissioner has good cause to believe that the operation of a motor vehicle on the highways by the person would be inimical to public safety or welfare."^[87] The Department has not attempted to show that, as a group, persons who cannot demonstrate lawful presence present this type of risk to public safety. Instead, the Department's concern is that a person with a driver's license will blend into society and be difficult to detect. Section 171.04 defines who is not eligible for a driver's license and does not provide the necessary authority to condition a driver's license on lawful presence in this country.

103. The Department relies on its statutory authority to deny a license to a person who is a nonresident of the state,^[88] and contends that a person who has no legal presence in the United States cannot be a resident. Beyond the definition of "resident," the Department relies on its general authority to set application standards.^[89] The Department can only issue a driver's license to an individual who has a residence address in the state at the time of application.^[90] "Residence address" (and "permanent mailing address") is defined as "the postal address of the permanent domicile within this state where an individual: A. resides; B. intends to reside within 30 calendar days after the date of application; or C. intends to return whenever absent."^[91]

104. The Department acknowledges that governing statutes do not fully define the terms "resident" or "nonresident."^[92] However, it points out that Minnesota Statutes § 171.06, subdivision 1 states: "All applications requiring evidence of legal presence in the United States must be signed in the presence of the person authorized to accept applications [or a notary public]." Subdivision 1 also sets the same requirement for first-time applicants and those with a change of status.^[93] The Department asserts that its authority to adopt rules concerning applications is sufficient authority to define "legal presence" and establish when such a signature is required. But section 171.06, subdivision 1 must be viewed in the context in which it appears. It does grant the Department authority to develop the application format, charge the proper fee, and further define who must sign in person or by notarized affidavit. It does not, however, address who is eligible or ineligible to apply for or receive a driver's license. The Department has no clear statutory authority to grant a license only to persons who demonstrate that they are lawfully present in the U.S. This conclusion is supported by Minnesota case law.

Minnesota Supreme Court Cases

105. The Minnesota Supreme Court has held that a state agency cannot tie Minnesota residency to immigration status absent clear statutory authority. In Nagaraja

v. Commissioner of Revenue,^[94] nonimmigrant aliens were denied property tax refunds by the Commissioner of Revenue. The Commissioner contended that nonimmigrant aliens were not capable of establishing domicile in the State of Minnesota until their admission status changed, and were not eligible for the property tax refund. The Court found that admission status was not determinative, and it would not find, as a matter of law, that such persons were incapable of establishing their domicile in Minnesota. It would consider a variety of other factors, such as payment of taxes, mailing address, licenses, banking, and membership in organizations.^[95] The same reasoning applies here. There is no statute directing the Department to condition the Minnesota driver's license on lawful presence in the U.S., or to determine who holds that status.

106. Other Minnesota Supreme Court cases have addressed the question of whether a state agency can tie state benefits to authorized presence in the United States. In Correa v. Weymouth Farms, Inc.,^[96] the Supreme Court held that an unauthorized alien who applied for workers' compensation could not be denied temporary total disability benefits. An "alien" met the statutory definition of "employee," and no statute prohibited an unauthorized alien from receiving temporary total disability benefits. To be eligible for the benefits, the employee was required to conduct a "diligent job search." The employer argued that Congress had enacted the Immigration Reform Control Act (IRCA), and that IRCA, or the policy behind it, prohibited unauthorized aliens from conducting a diligent job search, first, because it was illegal for an employer to hire the person, and second, because it was a crime to present fraudulent documents representing that the person could be lawfully employed. Thus, the employer claimed, IRCA prohibited unauthorized aliens from legally working in the United States, and prevented the claimant from conducting a diligent job search. However, the Supreme Court found that "a diligent job search" is "a search that is reasonable under all the facts and circumstances," and that immigration status would be only one of many facts to take into account.^[97]

107. Correa was consistent with the Court's prior decision holding that unauthorized aliens who sustained work-related injuries were eligible for workers' compensation benefits.^[98]

108. In Flores v. Department of Jobs and Training,^[99] the Minnesota Supreme Court reviewed a requirement that an unemployment compensation claimant must be available for work and actively seeking work in order to receive unemployment benefits. The claimant did not have a work authorization from the INS. She had entered the U.S. legally, but her status had expired. The INS was aware of her status but had not deported her. The claimant was not legally entitled to accept employment and acceptance of work would expose her to deportation. The Supreme Court pointed out that deportation is not a criminal proceeding and is not punishment. It found that "as long as the law neither prohibits nor obstructs an offer of employment to or the hiring of an alien who does not have work authorization," benefits could not be denied.^[100] The Court acknowledged that the law was changing to prohibit an offer of employment. However, the agency could not impose a rule that conflicted with or was inconsistent with the governing statutes that were then in effect.

109. Although Correa and Flores deal with different regulatory authority, it is clear that the Minnesota Supreme Court takes a dim view of using authorized presence in the U.S. as a litmus test for either residency or receipt of a state benefit, and will closely scrutinize an agency's statutory authority to do so.^[101]

110. The Department maintains that a driver's license is a privilege and not a benefit, and that it can limit that privilege to those who can demonstrate lawful presence. Yet, by its own admission, the driver's license or state identification card is a "gateway document" that may be needed to fully participate in the state's economy and to apply for services.

111. The Department has failed to show that it has statutory authority to condition eligibility for a driver's license on authorized presence in the U.S.^[102]

Federal Preemption of State Immigration Regulation

112. One of the Department's stated purposes for the rule is to coordinate Minnesota residency with lawful presence in the U.S. Several commenters claim that the Department's proposed rule is preempted by federal law because only Congress is authorized to regulate immigration. The Department responds that it is relying on the immigration status established by the federal government and not making an independent determination. However, the proposed rule establishes a limited list of federal documents that the Department will accept as evidence of lawful presence.^[103] There is no specific federal directive for states to check the lawful presence of driver's license applicants and no list of federally-approved documents to be checked by each state. Thus, the Department's authority to condition a license based on lawful presence must be examined.

113. The federal government has exclusive power to regulate immigration.^[104] That power derives from the United States Constitution which grants to the federal government the power "to establish a uniform Rule of Naturalization,"^[105] and "regulate commerce with foreign nations."^[106] The Supreme Court has recognized that not all state statutes that deal with aliens are *per se* regulation of immigration.^[107] A state statute must pass all of the following three tests if it is to survive federal preemption: 1) does the state law constitute a "regulation of immigration;" 2) does federal immigration law "occupy the field" in which the state statute seeks to regulate; and 3) is there a direct conflict between state and federal law.^[108] Stated from another perspective, the state statute cannot impose "additional burdens not contemplated by Congress."^[109]

The Proposed Rule Regulates Immigration

114. In reviewing the state's proposal, one must

"determine whether, under the circumstances of this particular case, [the proposed rule] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one

aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits...”^[110]

115. The United States Supreme Court rejected Pennsylvania's attempt to register aliens living in that state. Its decision dwelled at length on the supremacy of the national power in the general field of foreign affairs, and the important and delicate protection of the citizens of another country. “Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise for real or imagined wrongs to another’s subjects inflicted, or permitted by a government.”^[111] Numerous treaties address such matters, guaranteeing broad rights and privileges to aliens in our country and securing reciprocal promises and guarantees for U.S. citizens abroad. The field of international relations also includes a body of customs for dealing with foreign visitors.^[112]

116. Because of this delicate relationship, the Supreme Court has narrowly limited the right of a state to impose unusual burdens or obligations upon aliens. “[R]epeated interception and interrogation [of aliens] by public officials – thus bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one.”^[113]

117. Negotiations between the U.S. and other countries may affect the priority the INS places on deporting aliens who have overstayed their period of lawful admission. Inconsistent state standards may in fact impede federal policy objectives.

118. The United States Supreme Court has rejected the right of individual states to limit aliens’ residency. States “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”^[114] This includes both admission standards, and the conditions under which a legal entrant may remain.^[115]

119. The Department contends that it is not regulating immigration because it is relying on the federal government’s determination of lawful presence. However, the Department is not directly communicating with a federal agency for verification.^[116] Instead, the Department is attempting to limit its definition of “resident” to persons who present specified federal documentation. Only the Department’s approved primary documents are acceptable evidence of lawful presence and residence.^[117] In addition, as pointed out by some commenters,^[118] there are groups of persons who are lawfully present who are not covered by the Department’s proposed rule, including some asylum seekers and women protected by the Violence Against Women Act.^[119] Also, once the period of temporary lawful admission has passed, an individual cannot be compelled to leave the United States until deportation proceedings are completed, even if that person’s authority to remain has expired. The Department’s Exhibit 17 lists 79

categories for admission, but it has not demonstrated that its list of acceptable documents will cover them all. By tying “residence” to a restricted list of acceptable documents, the Department could deny a lawful alien access to a common identification document and license to drive.

Federal Law Occupies the Field

120. The federal government has enacted complex and comprehensive legislation and regulations that govern authorized entry, length of stay, residence status and deportation.^[120] It is so pervasive as to fully occupy the field of alien regulation.^[121] A state cannot, on its own, determine who is or is not entitled to be present in the United States. That power is reserved to the INS and to immigration judges.^[122]

121. The Department has failed to show that its proposed rule is permissible under federal law. Its application will inevitably become excessively entangled in federal enforcement.

122. The facts of Flores^[123] provide a clear demonstration of the practical problems the Department would encounter if it attempts to condition the driver’s license on evidence of lawful presence, and issue a license with a status check date tied to the lawful admission period. Ms. Flores entered the United States in 1970. She applied for permanent residence through her daughter, who was born in the United States, but because of changes to the immigration laws, she became vulnerable to deportation. In 1979, she was notified that the INS would take no action to deport her until further notice. In 1982, she was notified that she was subject to deportation or voluntary departure within 30 days, but the INS granted nine extensions through November, 1984. She returned to Mexico later that month but the consulate declined to grant Flores an immigrant visa. Instead, she was paroled to the U.S. on humanitarian grounds until February 3, 1985. She was readmitted to the U.S. on January 4, 1985, and returned to a job she had held when she departed in 1984. A week later, she was laid off. During the claim period, the INS made no effort to deport her, although she was not authorized to accept employment after January 4, 1985.

123. Although it is not clear precisely how Ms. Flores’ documents would match up to those the Department would require to show authorized presence, it is apparent that Ms. Flores’ status was in constant flux and would have required repeated trips to a licensing agent, had the Department’s rule been in effect when Ms. Flores applied for a driver’s license. Yet no federal law allows repeated proof of immigration status to a state official.

124. The Department presented no evidence that Congress has directed the states to deny driver’s licenses to persons who have overstayed their period of lawful admission, nor has it directed the states to accept only certain types of proof of lawful presence before issuing a driver’s license. Instead, the Department has decided which documents it believes will demonstrate continued lawful presence and will require those documents to be presented for review and approval or disapproval by its staff. Each

time a person with temporary admission status seeks an extension, renewal or change of status, the Department will reexamine the documentation. Persons without the documents that the Department has determined are acceptable will be denied a license, even if no steps have been taken to deport them. Each state could arguably develop its own list of acceptable documents and leave a patchwork of differing requirements.^[124] It is just such entanglement with national immigration policy and inconsistent treatment of aliens by the states that the United States Supreme Court has routinely rejected.

125. The proposal to include a status check date on the face of the driver's license will further entangle the Department in the regulation of immigration. The status check date implies that a person has overstayed the period of legal admission when that status may have changed with the INS. In its post hearing comments, the Department stated that, as of June 5, 2003, 995 licenses (or identity cards) were cancelled due to the status check expiration, but 308 were reinstated because the license holder provided acceptable documentation. The proposed rule places the burden on the license holder to continually update the Department of changing immigration status.^[125]

126. The proposed rule violates federal law because it attempts to regulate immigration and improperly enters a field occupied by the federal government. It is not necessary to address possible conflict with federal law.

National Security

127. The Department asserts that the proposed rule will enhance national security and deter terrorism. Terrorists have discovered a dangerous weakness – foreign nationals are difficult to track, once admitted to the U.S. The Department contends that a driver's license masks their status and allows them to move freely about the country with little fear of detection or apprehension.^[126] The federal reports that the Department produced demonstrate the need to tighten proof of identity to enhance national security but provide no clear support for tying a driver's license to evidence of lawful presence.

128. The National Strategy for Homeland Security report issued in July, 2002, proposes six critical areas and 43 major initiatives to improve homeland security.^[127] It also identifies 12 major initiatives to reform related federal and state laws. Only one of these initiatives is relevant. It is to "[c]oordinate suggested minimum standards for state driver's licenses." The report states that terrorist organizations, including Al-Qaeda, have exploited the differences in state standards on content, format and license acquisition procedures. The report recommends that the federal government assist the states in crafting solutions to curtail abuse of driver's license by terrorist groups, and support state-led efforts to develop suggested minimum standards. The report makes no mention of linking the state's driver's license to lawful presence in the U.S.

129. The Forward and Executive Summary to the Report of the National Commission on Terrorism was also offered to support the Department's proposed rule.^[128] It concludes that the threat to the U.S. from international terrorism is

increasing, and countering the growing danger will require greater effort by U.S. intelligence and law enforcement. None of the report's 18 counterterrorism recommendations have any relationship to the Department's proposals.^[129]

130. As the Department points out, the federal government has taken steps in the past two years to tighten restrictions on aliens. For example, the Department indicated to the Chief Administrative Law Judge that on May 14, 2002, President Bush signed the Enhanced Border Security and Visa Entry Reform Act, which directs the Attorney General to develop an electronic means of verifying and monitoring foreign students, to exchange visitor information, and to ensure that refugees and asylees are issued work authorizations that contain fingerprints and photo identification.^[130] Congress has also enacted legislation requiring background checks for commercial drivers applying for or renewing their hazardous materials endorsements.^[131]

131. If greater evidence of lawful presence is a matter of national security or necessary for the enforcement of national immigration policy, the case law suggests that it is appropriately addressed by the federal government and not by each state individually. The Department has not attempted to show that Minnesota's interests are separate from or greater than those of the nation as a whole. Thus the Department has failed to show that the proposed rule is necessary or reasonably related to the stated purpose of enhancing national security and deterring terrorism.

132. Many commenters fear that the status check date will also lead to unfair discrimination against persons with that date on their license.^[132] The Department dismisses this concern, relying on the protections of the state human rights laws. However, the mere presence of the status check date invites questions about the person's immigration status from those who request the license for identification. Even if law enforcement has a legitimate interest in such information, it is not clear how businesses that routinely request the license to verify birth date, identity or address, have such an interest.^[133]

133. Some of the Department's concerns will be addressed through the stricter identification requirements imposed in 7410.0400. As explained above, the Department has the statutory authority and has demonstrated the need and reasonableness for requiring a person who seeks a Minnesota license to establish his or her identity. Some persons who are not legally present in the United States will not be able to provide acceptable evidence of their identity and can be denied a license on that basis. Although the evidence of identity and lawful presence may often be the same, the two concepts are different.

134. For the reasons set forth above, the Administrative Law Judge finds that the Department lacks the statutory authority to adopt proposed rule 7410.0410, that the proposed rule is not permitted under federal law, and that the Department has failed to show that the rule is necessary or reasonable to meet the Department's stated purpose, to enhance national security and deter terrorism.^[134]

7410.1800 Driver's License Photograph (Repeal).

135. The Department proposes to repeal Minn. R. 7410.1800. That provision allows for a method of identification on a driver's license in lieu of a photograph for persons with religious objections to being photographed. The Legislature has given the commissioner specific authority to authorize an exception to the photo requirement for persons with such religious objections. It states: "The commissioner of public safety may adopt rules to permit identification on a driver's license or Minnesota identification card in lieu of a photograph or electronically produced image where the commissioner finds that the licensee has religious objections to the use of a photograph or electronically produced image."^[135] Current rule 7410.1800 implements that delegation of authority. It allows for an alternative to the photograph or electronic image if the applicant submits "a signed certificate or statement that the taking of a photograph and its use as identification violates the tenets and beliefs of the applicant's religion."^[136]

136. Although the statute does not require the religious exception to the photo requirement, the Department must show why a change from the current rule or practice is necessary and reasonable.

137. The Department acknowledges that "a very small portion of those applying for drivers' licenses hold legitimate beliefs against the use of photography."^[137] It does not indicate how many people have requested the exception to the photo requirement for religious reasons. The Department relies on its justification for new rule 7410.1810 that requires a photograph or electronic image on all licenses to support repeal of the exception.

138. The Department also refers to a memo from the Department of Justice explaining why the events of September 11, 2001 have led to a change to require a photograph on an INS Form I-551, and the memo expresses concern that the risk of misuse of the INS form without a photo is "too great."^[138] By implication, the Department represents that the repeal of the religious exception is necessary for national security. However, the Department has failed to explain why this generalized concern about persons entering the United States is sufficiently clear or specific to prevent a small group residing in Minnesota from exercising their religious objection to being photographed. The Department implies that there is a greater risk today that persons will falsely claim the exception, and advance terrorism or other illegal activity. However, the Department has offered no information of terroristic activity or any other illegal activity, including identity fraud, by persons who claimed the religious exception to get a state-issued driver's license or identification card without a photo, nor has it offered evidence that some persons have falsely claimed the exception.^[139]

139. As discussed more fully relative to proposed rule 7410.1810, the Minnesota Constitution limits interference with the rights of conscience, unless such practices are inconsistent with the peace or safety of the state.^[140] Even where the state has demonstrated a compelling interest in requiring photos on a driver's license, as it has here, one must examine whether there is a less restrictive alternative for persons who object.^[141]

140. The Department has offered no evidence that its current limited exception for persons who have religious objections is unworkable or fosters illegal activity. It has merely asserted that such problems could arise.

141. The Department has failed to demonstrate the need for and reasonableness of the rule's repeal.

7410.1810 Driver's License and Identification Card Image.

7410.1810, subpart 1 Image.

142. The Department proposes to add 7410.1810. Subpart 1 requires every applicant for a driver's license to have a full-face photo taken by the Department that is a representation of the true appearance of the applicant. Further, it requires that the face of the applicant must be uncovered and unobscured. There is clear statutory authority for the photo requirement. It states that "[e]very license must bear a colored photograph or an electronically produced image of the licensee."^[142] The Department also relies on the general authority of the commissioner to adopt rules that prescribe "standards for the uniform administration of laws and rules governing the receipt of applications" and "standards for submitting applications including valid forms of identification...."^[143] In addition, the license must bear "a description of the licensee in a manner as the commissioner deems necessary...."^[144]

143. The Department contends that the rule is necessary because the facial image is a critical security and identity feature on the state-issued document. Descriptive information such as height, weight and eye color is not precise, and a signature can be forged. The Department does not have the ability to use any other biometric identifier at this time. Also, the Department states that the license is used by law enforcement to determine identity in traffic control, and for purposes "other than driving," although these other purposes are not spelled out in the SONAR. The Department also asserts that the license is used for identification by businesses, government, and transportation systems. In its brief to the Court of Appeals concerning the emergency rules, the Department more clearly identified the State's interests in requiring a photo:

- a. It will protect the integrity of Minnesota's license by ensuring that each person who carries a license is visibly the person who obtained it;
- b. It will help protect the citizens and institutions of the State from the menace of identity fraud; and
- c. It will assist national security by preventing persons with interests antithetical to national security from borrowing or stealing lawfully-obtained identity documents to undermine public safety interests.^[145]

144. There was no significant objection to the general requirement that driver's license should include a full-face image. However, some persons objected to the requirement that the face be uncovered and unobscured.

145. In general, the Department has demonstrated the need for and reasonableness of clarifying the type of photograph it will place on the license, and requiring that the face be uncovered and unobscured. It has indicated that some headwear will be permitted, so long as the face is not obscured.^[146] This addresses some of the objections to the proposed rule.^[147]

146. Minnesotans for Immigration Reform fully supports the Department's proposal to require the full-face image in all cases, because the photo is the only biometric identifier currently available in the state and because the photo requirement for passports and other immigration documents has no religious exception.^[148]

147. Some commenters assert that requiring a full-face image for persons who have a religious objection to that image will violate Article I, § 16 of the Minnesota State Constitution and the Free Exercise Clause of the First Amendment to the United States Constitution.^[149]

148. Article I, § 16 of the Minnesota State Constitution "prohibits the infringement or interference with religious freedom."^[150] It limits any control of or interference with the rights of conscience, unless such practices are inconsistent with the peace or safety of the state.^[151] The Minnesota Supreme Court has held that the Minnesota freedom of conscience clause provides greater protection than the Federal Constitution, and it has declined to follow the United States Supreme Court's more limited analysis.^[152] Instead, it has retained "the compelling state interest balancing test," a four-part test to evaluate claims that limitations infringe on one's exercise of conscience.^[153] The four prongs are: whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means.^[154]

149. First, is the objector's belief sincerely held? The Department contends that many Muslim women in nations with large Muslim populations do not cover their faces in government identification photos, but it concedes that some persons have a legitimate religious objection to appearing in public or being photographed with their face fully uncovered.^[155]

150. Second, does the State's regulation burden the exercise of religious beliefs? There is no criminal penalty for refusing to be photographed with the face uncovered. However, the Department concedes that the requirement will burden the rights of those with sincerely held beliefs because those persons must choose between obtaining a driver's license or adhering to their beliefs. The Department's brief to the Court of Appeals^[156] asserts that the burden is not unreasonable because an individual could obtain other identification, such as a social security card, without a photo. Also some of the same persons present federal legal presence identity documents that show a full facial image. The Department concludes that "these same individuals will consent to having a similar image taken for the license."^[157] In essence, the Department expects that some individuals will forsake their beliefs when required to do so to obtain a state-

issued “gateway document” such as a driver’s license or state identification card. Nonetheless, that choice will burden the exercise of a sincerely held belief.

151. Third, is the State’s interest in the regulation overriding or compelling? Here, the Department asserts that it “is necessary to eliminate any exception to the requirement for a facial image on the state driver’s license and state identification card. The facial image is a critical security and identity feature on the state-issued document. Descriptive information such as height, weight and eye color is not precise. A signature can be forged.”^[158] It is clear that law enforcement and others use the license with a photo for identification. There is no question that, in general, the State has shown a compelling interest in requiring the photo image. The question is whether that interest outweighs an individual’s sincerely held religious beliefs.

152. Fourth, has the State used the least restrictive means for effectuating its compelling interest? The Department has not described any situations where the lack of a full-face image on a driver’s license or state identification card issued to a person with a sincerely held religious objection has created a problem for law enforcement, has led to identity theft, or is “inconsistent with the peace or safety of the state.”^[159] Thus, it has produced no support for its claim that the less restrictive alternative, a limited exception to the photo requirement, will not adequately address its interests, or will significantly impair its ability to achieve the overall objective of placing photos on the driver’s license or state identification card.^[160]

153. The Department has identified another less restrictive alternative. The photograph could be taken and kept on file at the Department in the event that identity questions were raised by law enforcement. For those who object to appearing in public with the face uncovered, this would be less intrusive than the requirement that the photo appear on the license or identification card where it can be viewed by many.^[161]

154. The Minnesota Supreme Court’s decision in State v. Hershberger^[162] is instructive. In that case, the Court found that both religious liberty and public safety are important, fundamental interests. When there are significant competing interests such as there are in the Department’s proposed rule, the Court looked for an alternative that could achieve both values articulated in Article I, section 16.^[163] In that case, Amish people objected to using a specific shape and color symbol to identify their slow-moving vehicles traveling on public roads. As in this case the requirement was generally acceptable and rationally related to public safety. But Amish people proposed the alternative use of reflective tape and a hanging red lantern. The Supreme Court found that the State had failed to show that the less restrictive alternative would not adequately assure public safety. As the Court stated: “Merely because public safety is articulated as a competing interest...does not establish that interest as paramount. To infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety cannot be achieved through reasonable alternative means.”^[164]

155. The same analysis applies here. The Department has failed to show that requiring a full-face image for every person, regardless of their sincerely held religious

objection, is consistent with the freedom of conscience clause of the Minnesota Constitution, and it has failed to demonstrate why public safety cannot be advanced through a less restrictive alternative. Nor has the Department demonstrated based upon this record that the state's interest in regulation outweighs the sincerely held religious beliefs of a few.

156. Because the Department has failed to show that it has proposed the least restrictive approach to burdening the sincerely held religious beliefs of a few, it has failed to demonstrate that a full-face image in all cases, without regard to the exception for sincerely held religious beliefs is constitutional. In order to correct this defect, it must allow some limited exception. Such an exception is within the scope of the rule as proposed and would not constitute a substantial change.

157. Some commenters assert that the proposed rule also violates the federal constitutional protection of religious expression.^[165] Some relied on Quaring v. Peterson, in which the United States Court of Appeals for the Eighth Circuit struck down a Nebraska law requiring a photograph of the driver's license applicant.^[166] That decision, and others limiting states' rights to require a driver's license photo, did conclude that the state's interests did not outweigh the burden placed on religious beliefs. However, they were decided prior to a more recent United States Supreme Court decision upholding state requirements that imposed facially neutral requirements, not intended to limit religious expression, even when the requirement could limit legitimately held religious beliefs.^[167] Because of the stricter test under the Minnesota Constitution, it is not necessary to resolve this question of federal constitutional law.

7410.1810, subparts 2 and 3 Use of Previous Image and Updated Image Required Upon Return.

158. The Department has demonstrated the need for and reasonableness of the subparts 2 and 3 of proposed rule 7410.1810. Subpart 2 specifies when the Department will use the image on file to issue a replacement license or identification card. Subpart 3 allows a person 30 days after returning to the state to go to a driver's license renewal office to have a new photo image taken. At the hearing, the Department offered a modification to subpart 3 as proposed, to correct an incorrect reference.^[168] As proposed, this subpart refers back to subpart 2, item B, and was corrected to refer to subpart 2, item C. This is merely a clarification, consistent with the intent of the provision as originally proposed, and is not a substantial change from the language as proposed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department gave proper notice of the hearings in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, 1b and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted in Findings of Fact Nos. 92, 134, and 156.

4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted in Finding of Fact Nos. 77, 81, 87, 134, and 141.

5. The modifications to the proposed rules that were offered by the Department after publication in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. Due to Conclusion No. 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 4.

7. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

8. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted, except where specifically otherwise noted above.

Dated this 18th Day of July 2003.

S/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Transcript Prepared.

NOTICE

The Department must wait at least five working days before taking any final action on the rules. During that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minnesota Rules, part 1400.2100, and Minnesota Statutes, section 14.15, subdivisions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects. If the Department elects to make any changes to the rule, it must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either follow the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to follow the suggested actions, it must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Department must give notice to all persons who requested that they be informed of the filing.

^[1] Minn. Stat. §§ 14.131 through 14.20 (2002).

^[2] Ex. 32.

^[3] Exs. 33-35, 37, and 38.

^[4] Exs. 36 and 38.

^[5] Minn. Stat. § 14.388. Ex. 6.

^[6] Minn. Stat. § 14.388. Ex. 7.

^[7] Both the Minnesota Civil Liberties Union and the Jewish Community Action group sent letters opposing the use of emergency rulemaking.

^[8] Order of ALJ George A. Beck, dated June 7, 2002.

^[9] Ex. 7.

[10] Order of Chief Judge Kenneth A. Nickolai, dated June 21, 2002. The Chief Judge, however, found no evidence of a link between terrorism and individuals attempting to apply for a driver's license by presenting federal admission documents about to expire or fraudulent identification. He further disallowed the Department's efforts to link expiration of legal immigration status and expiration of a Minnesota driver's license, and the Department's desire to deny a driver's license to residents whose immigration authorization expired in less than 60 days.

[11] Minn. Stat. § 14.388. "Rules adopted . . . under [the serious and immediate threat to the public] clause are effective for a period of two years from the date of publication of the rule in the State Register."

[12] The new rules further required that applications, initial or renewal, would not be accepted from individuals whose admission status is no longer valid or expires in 30 days or less.

[13] 27 State Register 45.

[14] Jewish Community Action, et al. v. Comm'r of Public Safety, CX-02-1214, at *13 (Minn. Ct. App. March 11, 2003). The Court of Appeals declined to review any other issues raised by Petitioners, including the "status check" provision of the rules.

[15] Ex. 41.

[16] Exs. 40, 42-47, and 49.

[17] Exs. 48 and 49.

[18] Ex. 52.

[19] Ex. 53.

[20] Exs. 60-67.

[21] Ex. 58.

[22] Ex. 56.

[23] Ex. 59.

[24] Minn. R. 7410.0400.

[25] Minn. R. 7410.0410.

[26] Minn. R. 7410.1800.

[27] Minn. R. 7410.1810.

[28] SONAR, p.1.

[29] Minn. Stat. § 14.131.

[30] SONAR, p. 11.

[31] Comment of Minnesota Civil Liberties Union, May 22, 2003.

[32] Comments of Robert P. Webber, May 18, 2003; Robert A. Aronson, May 21, 2003; Peter J. Nickitas, May 22, 2003; Nancy Hite, May 27, 2003.

[33] SONAR, p. 23.

[34] SONAR, p. 13.

[35] Minn. Stat. § 14.131.

[36] Minn. Stat. § 14.002.

[37] Minn. R. 7410.0410, subp. 15.

[38] Comments of Elizabeth M. Streefland, June 10, 2003; Nobles County Community Action Committee, May 29, 2003; Robert P. Webber, May 18, 2003 (Ex. 75).

[39] Minn. Stat. § 14.111.

[40] Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989); Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

[41] In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

[42] Greenhill v. Bailey, 519 F.2d 5, 19 (8th Cir. 1975).

[43] Mammenga, 442 N.W.2d at 789-90; Broen Memorial Home v. Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

[44] Manufactured Housing Institute, 347 N.W.2d at 244.

[45] Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 233, 63 S. Ct. 589, 598 (1943).

[46] Minn. R. 1400.2100.

[47] Minn. Stat. § 14.15, subd. 3.

[48] Minn. Stat. § 14.05, subd. 2.

[49] SONAR, p.14.

[50] *Id.*, p. 2.

[51] *Id.*, pp. 2-3.

[52] *Id.*, p. 2, 5.

[53] Ex. 18, p. 49.

[54] SONAR, p. 3.

[55] The INS has been transferred to the Department of Homeland Security and renamed the Bureau of Citizenship and Immigration Services. For the purposes of this report, the abbreviation INS has been used.

[56] SONAR, p. 2.

[57] Minn. Stat. § 171.06, subd. 3 (a)(2).

[58] Minn. Stat. § 171.061, subd. 6 (3), (5) (emphasis added).

[59] The term “photo” as used herein means a color photograph or electronically produced or digitized image.

[60] SONAR, p. 3.

[61] Ex. 82.

[62] Comment of Kim Hunter, May 28, 2003.

[63] Comments of Kim Hunter, May 28, 2003; Minnesota Advocates for Human Rights, May 23, 2003; Salima Khakoo and Dinesh Shenoy, May 22, 2003.

[64] Comment of Gene Ofstead, May 22, 2003.

[65] *Motor Vehicle Mfg Ass’n v. State Farm Mut.*, 463 U.S. 29, 103 S.Ct. 2856 (1983).

[66] SONAR, p. 14.

[67] *Id.*, p. 3, quoting from Ex. 14.

[68] SONAR, p. 14.

[69] Response to Public Comments Received Through June 9, 2003, p. 4.

[70] Comment of Salima Khakoo, and Dinesh Shenoy, May 22, 2003.

[71] *See* Finding 77.

[72] *See* Finding 78.

[73] Comment of Leonard Oppenheimer, transcript p. 146.

[74] Comment of Salima Khakoo and Dinesh Shenoy, May 22, 2003.

[75] It is not clear from the Department’s comments whether the request for a variance under Minn. R. 7410.0600 must also comply with Minn. Stat. §§ 14.055 and 14.056. *See* Department Response to Public Comment Received June 10 and 11, 2003, p. 4, discussing the variance process for persons seeking to establish lawful presence.

[76] SONAR, pp. 15-16.

[77] The criteria for accepting documents submitted in a language other than English are spelled out in Minn. R. 7410.0400, subp. 5.

[78] “‘Rule’ means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by the agency or govern its organization or procedure.” Minn. Stat. § 14.02, subd. 4. *See also*, Minn. R. 1400.2100 G.

[79] Proposed subpart 6, item B.

[80] Proposed subpart 6, item A and subpart 8.

[81] Proposed subpart 9, as modified, Department Response to Comments Received through June 9, 2003, p. 8.

[82] Proposed subparts 10 and 11.

[83] SONAR, p. 16.

[84] Ex. 82.

[85] Comments of Chris Carlson, June 11, 2003; Todd A. Noteboom, *et al.*, June 11, 2003; Kim Hunter, May 28, 2003; Elizabeth M. Streefland, transcript, pp. 56, 61-64, and June 10, 2003.

[86] Comments of Todd A. Noteboom, *et al.*, June 11, 2003; Minnesota Civil Liberties Union, May 22, 2003; Peter Nickitas, transcript, pp. 44-45, 47-50; Caroline Palmer, transcript p. 40; David C. List, transcript pp. 31-34.

[87] Minn. Stat. § 171.04, subd. 1 (10).

[88] Minn. Stat. § 171.01, subd. 42 (2003), defines a nonresident as “every person who is not a resident of the state.”

[89] Minn. Stat. § 171.061, subd. 6 (5) (2001), requires the Commissioner to prescribe “standards for submitting applications including valid forms of identification”

[90] Minn. R. 7410.0400, subp. 1a.

[91] Minn. R. 7410.0100, subp. 12; see also Buckheim v. Buckheim, 231 Minn. 333, 43 N.W. 2d 113 (1950)(“residence” is ordinarily defined as abode, dwelling, habitation, or place where one actually lives).

[92] Department’s Response to Public Comment Received June 10 and 11, 2003, p. 4.

[93] Minn. Stat. § 171.06, subd. 1, providing: “All first-time applications and change-of-status applications must be signed in the presence of the person authorized to accept the application [or a notary public].”

[94] 352 N.W.2d 373 (Minn. 1984).

[95] Id. at 377.

[96] ___N.W.2d___, C9-02-1172 (Minn. July 3, 2003).

[97] Id. at *10-11, (quoting Redgate v. Sroga’s Standard Serv., 421 N.W. 2d 729, 734 (Minn. 1988)).

[98] See Gonzalez v. Midwest Staffing Group, Inc., 59 Minn. Workers’ Comp. Dec. 207 (WCCA), aff’d without opinion, 598 N.W.2d 657 (Minn. 1999).

[99] 411 N.W.2d 499, 504 (Minn. 1987).

[100] Id.

[101] Cf. Shanlian v. Dept. of Human Services, 417 N.W. 2d 313 (Minn. Ct. App. 1988) (holding that state can tie eligibility for state benefits program to federal eligibility for SSI, even if SSI is limited to aliens lawfully admitted, because there is no separate state evaluation of immigration status).

[102] Although the Department does have authority to require evidence of Minnesota residency, it has not proposed any changes that would strengthen that determination. Minn. Stat. §§ 171.03 and 171.04.

[103] Minn. R. 7410.0410, subp. 4 (proposed).

[104] See De Canas v. Bica, 424 U.S. 351, 354, 96 S.Ct. 933, 936 (1976).

[105] U.S. Const. Art. I, § 8, cl. 4.

[106] U.S. Const. Art. I, § 8, cl. 3.

[107] See Graham v. Richardson, 403 U.S. 365, 372-73, 91 S.Ct. 1848, 1852-53 (1971) (citing a line of cases protecting a state’s right to favor its own residents over noncitizens).

[108] De Canas, 424 U.S. at 354, 96 S.Ct. at 936. The Court rejected the state statute at issue on the basis that states may only regulate immigration consistently with federal law.

[109] Toll v. Moreno, 458 U.S. 1, 13-14, 102 S.Ct. 2977, 2984 (1982).

[110] Hines v. Davidowitz, 312 U.S. 52, 67-68, 61 S.Ct. 399, 404 (1941).

[111] Id. at 64, 61 S.Ct. at 402-03.

[112] Id. at 65, 61 S.Ct. at 403.

[113] Id. at 66, 61 S.Ct. at 403.

[114] Takahashi v. Fish and Game Commission, 334 U.S. 410, 419, 63 S.Ct. 1138, 1142 (1948).

[115] See De Canas, 424 U.S. at 355, 96 S.Ct. at 936.

[116] See League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 770 (C.D. Calif. 1995).

[117] Minn. R. 7410.0410, subp. 4 (proposed).

[118] Comments of Salima Khakoo and Dinesh Shenoy, May 22, 2003; Minn. Advocates for Human Rights, May 23, 2003.

[119] See, e.g., Comment of Chris Carlson, June 11, 2003.

[120] See, e.g., 8 U.S.C. § 1101 (a)(15), listing 22 categories of nonimmigrant aliens, and (a) (27), listing 13 categories of special immigrants, with an accompanying list of treaties governing persons covered by (a)(15)(E)(i) and (ii).

[121] See Gonzales v. City of Peoria, 722 F.2d 468, 474-75 (9th Cir. 1983).

[122] See De Canas v. Bica, 424 U.S. 351, 355, 96 S.Ct. 933, 936 (1976); see also League of United Latin American Citizens, 908 F.Supp. at 770 (citing 8 U.S.C. § 1252(b); 8 C.F.R. § 242.1(a)).

[123] Flores v. Department of Jobs and Training, 411 N.W.2d 499, 500-01 (Minn. 1987).

[124] Ex. 10 shows the wide variation in states’ treatment of persons granted short-term admission.

[125] The Department’s current authority for including the status check date is unclear since, apparently, it was not included in its emergency rules. See SONAR, Ex. D, pp. 22-23.

[126] Ex. 7, p. 2.

[127] Ex. 18, p. xi, p. 49.

[128] Ex. 15.

[129] Id., pp. 3-5.

[130] Ex. 4, p. 7.

[131] Id.

[132] See, e.g., Comments of David C. List, transcript, pp. 31-32; Caroline Palmer, transcript p. 39.

[133] The Department has offered inconsistent statements about law enforcement's use of the status check date. At the hearing, the Department's witness testified that a law enforcement officer could detain an individual with an expired status check date until lawful presence could be verified with the INS. Transcript, pp. 119-28. Because overstaying one's lawful presence in the U.S. is not a crime, the authority for detaining the person to establish lawful presence is uncertain. See 8 U.S.C. § 1252c. See also *State v. Fort*, 660 N.W.2d 415 (Minn. 2003) (holding that unless there is a reasonable and articulable suspicion of criminal activity beyond the traffic offense, police expansion of a routine traffic stop beyond the underlying justification for the stop violates Article I, Section 10 of the Minnesota Constitution). In its written comments, the Department represented that law enforcement's use of the status check date was beyond the authority or control of the Department, except to the extent that it would warrant citation for driving with a cancelled license.

[134] Some commenters asserted that the proposed rule would violate the Equal Protection Clause of the Fourteenth Amendment. In light of the conclusion that the proposed rule is preempted by federal law, it is not necessary to address this claim.

[135] Minn. Stat. § 171.071, subd. 1.

[136] Minn. R. 7410.1800, subp. 3, item B.

[137] SONAR, p. 25.

[138] Statement of Johnny N. Williams, Executive Associate Commissioner, Dep't. of Justice, quoted at SONAR, p. 25.

[139] States vary in granting or denying a religious exception for the photograph. See Ex. 29.

[140] Minn. Const., Art. I, § 16.

[141] See *Hill-Murray Fed. of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992), *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

[142] Minn. Stat. § 171.07, subd. 1.

[143] Minn. Stat. § 171.061, subd. 6.

[144] Minn. Stat. § 171.07, subd. 1.

[145] SONAR, pp. 42-43.

[146] SONAR, p. 24.

[147] Sikh Society of Minnesota, May 22, 2003.

[148] Ex. 82.

[149] Todd A. Noteboom, *et al.*, June 11, 2003, Jordan Kushner, transcript pp. 72, 75-76.

[150] "The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people...nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state..." Minn. Const. Art. I, § 16.

[151] Minn. Const. Art. I § 16.

[152] See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990).

[153] See *Hill-Murray Fed. of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992), *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

[154] See *Hill-Murray*, 487 N.W. 2d at 865.

[155] SONAR, p. 24; see also SONAR, Ex. J.

[156] SONAR, Ex. D, pp. 41-42.

[157] SONAR, p. 24. A federal identity document, once issued, is not generally requested as a form of identification for widely available public goods and services. Also, Congress has plenary power to regulate immigration.

[158] Id.

[159] Minn. Const. Art. I, § 16.

[160] The Department stated in its brief to the Court of Appeals that an individual could petition for a variance, pursuant to Minn. Stat. § 14.055. The requirements of § 14.055 are more onerous than the current rule provision, and there is a cost to the person who petitions. Thus, if the Department would allow this exception, it would be more restrictive than its current rule provision. See SONAR, Ex. D, pp.

40, 42. It is also unclear whether any such petition would be granted since the SONAR states that the Department wants “to eliminate any exception “ to the requirement for a facial image. SONAR, p. 24.

[161] The Department has agreed to take the photo in a manner that respects personal privacy. SONAR, p. 24.

[162] 462 N.W.2d 393 (Minn. 1990).

[163] *Id.* at 399.

[164] *Id.*

[165] Todd A. Noteboom, *et al.*, June 11, 2003, p. 26.

[166] Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), aff’d by equally divided Court sub nom. Jenson v. Peterson, 472 U. S. 478, 105 S.Ct. 3492 (1985); see also Dennis v. Charnes, 646 F. Supp. 158 (D. Co. 1986), Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E.2d 1225 (1978).

[167] Employment Division, Dep’t of Motor Vehicles v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990).

[168] Ex. 76.